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Supreme Court of the United States

OCTOBER TERM, 1949

No. 783

CLARENCE JACKSON,

Petitioner,

against

HERMAN J. RUTHAZER, Warden of the City Prison, Borough of Manhattan, 125 White Street, New York,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The within brief is respectfully submitted to this Court in reply to the respondent's brief heretofore filed herein.

The respondent argues in his brief herein that this petition should be denied on the ground that it presents no substantial issue for this Court to determine. Respondent gives no other reason as to why this petition should not be granted. But there is a substantial issue herein and that issue is the interpretation of a very important statute, *Chapter 153, Title 28, U. S. C.*

Neither the District Judge, the Court of Appeals or the respondent herein have ever addressed themselves to the question of what this statute means. Petitioner claims

that clearly it means that the District Judge must give him a hearing on the merits notwithstanding a prior State Court hearing, unless petitioner has already been accorded a hearing in the Federal Court. *Title 28, U. S. C. § 2244.* It is submitted that this is the clear and unequivocal intendment of the statute. In view of the fact that Congress explicitly excluded the instance where there was an earlier hearing in the Federal Court it seems clear that the instance where the prior hearing was in the State Court the District Judge does not have any discretion as to whether or not he shall hear the matter. Certainly it cannot be said that restricting *Title 28, U. S. C. § 2244* to cases where "the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry" was an oversight on the part of Congress since the problem of habeas corpus where there had been a previous hearing in the State Court was certainly presented to Congress. Petitioner claims that these considerations can only lead this Court to interpret the statute in the manner advanced by him; but, in any event, it would trivialize the phrase "no substantial question" to say that in this instance, in view of the above, that doctrine should govern this Court's decision as to whether the writ of certiorari should be granted or denied herein.

The issue that petitioner seeks to present to this Court for its determination has only been presented on three other occasions in proceedings in a Federal Court. In *U. S. ex rel. Cook* v. *Dowd,* 180 F. (2d) 212, the Seventh Circuit disposed of the issue in the manner urged by petitioner herein. And in *Taylor* v. *Alabama,* 336 U. S. 907, 69 S. Ct. 510, the issue was such a difficult one that this Court split four—four. The third occasion was in *Application of Middlebrooks,* 88 Fed. Supp. 943, which was decided by the United States District Court for the Southern

District of California in February, 1950, and is referred to more fully hereinafter. Certainly under such circumstances it cannot be said that petitioner has not presented a "substantial issue".

As indicated above neither the District Court, the Court of Appeals or the respondent herein addresses itself to the statute hereinbefore cited. Instead, they have all completely overlooked the governing statute. In other words, they attempt to import notions involving general principles of equity and judicial administration—that there must be an end to litigation—which notions though often worthy must be rejected herein for the reasons stated. It is clear that in habeas corpus proceedings the rule of res judicata is not applicable. This represents a departure from the general rule that there must be an end to litigation. The Court of Appeals herein also relies upon the rule that a court should not hear an application where another court earlier passed upon substantially the same allegations. The habeas corpus statute explicitly deals with this case but it limits the rule as hereinbefore stated to instances where the earlier hearing was had in the Federal Court. *Title 28, U. S. C. § 2244.* In the instant case the prior hearing was in the State Court and the reasons which gave rise to the statutory limitation are not applicable here for the following reasons.

This Court has consistently held, without any degree of uncertainty, that a petitioner must invoke and exhaust all available state remedies before resorting to the Federal Courts in a habeas corpus proceeding. *Ex parte Hawk,* 321 U. S. 114; *Darr* v. *Burford,* 339 U. S. 200. Therefore a petitioner has no right of election as to whether or not in the first instance he will present his application to a State or Federal Court. The cases hold that it is mandatory that a petitioner follow the established procedure and resort to the State Court and its appellate tribunals before a Federal Court will entertain jurisdiction. After exhausting state remedies, as required, a petitioner is without remedy if the Federal Court refuses to hear the merits

of his petition. It seemingly matters not that the State Court's decision is at divergence with the Federal Court's decisions. All that is required is for the petitioner to submit his claims to the State Court and its appellate tribunals and then thereafter he can be barred summarily from asserting his Federal claims in the Federal Courts. As in the instant case it seems that a petitioner is placed at an unfair disadvantage in barring him from the Federal Courts because of a prior State Court hearing. This follows irrespective of there being no right of election on the petitioner's part as to which Court he will seek his remedy in. Therefore, in a given set of circumstances a State Court could say "we have given you a hearing on the merits of your petition, we have heard your testimony and considered your evidence, under our rules evidence in hearsay form is admissible to refute your allegations and testimony, and also under our decisions, in any event, your claims do not constitute sufficient basis for relief, even though under the Federal decisions they may suffice but we are not bound by those decisions in such a matter as this one and therefore we decide against you". And thereafter the Federal Court has the right to bar the petitioner from a hearing on the merits notwithstanding the fact that if the same evidence and testimony had been presented to the Federal Court in the first instance it would have been sufficient to form the basis for relief. It therefore follows that a petitioner in a case such as the instant one is placed in the position of being forced to resort to a State Court and thereafter run the risk of being barred from the Federal Courts where, if he had the right to proceed in the first instance, he would have been granted relief. It does not seem that a holding such as this constitutes the intent of our habeas corpus statutes or decisions thereunder.

In February, 1950, the United States District Court for the Southern District of California, Central Division, decided the precise point involved in the instant case in a manner directly contrary to the Court of Appeals herein.

In *Application of Middlebrooks,* the District Court discharged a petitioner from custody by way of writ of habeas corpus where the facts were practically identical with the instant case. The petitioner was allegedly a fugitive from justice in the State of Georgia, and he claimed violation of his constitutional rights under the Fourteenth Amendment to the United States Constitution in that he had been subjected to cruel and unusual punishments while confined on the "chain gang" under sentence in the State of Georgia. The petitioner had had a hearing in the State Court of California on his writ of habeas corpus and upon dismissal thereafter had applied to the intermediate appellate tribunal and the California Supreme Court without success and his application for a stay of proceedings pending application to the United States Supreme Court for a writ of certiorari had been denied by two justices of this Court. Notwithstanding the foregoing the District Court issued a writ of habeas corpus and proceeded to a hearing therein and discharged the petitioner from custody. In discharging the petitioner the District Court stated:

> "the rule of exhaustion of remedies in the State has been supplemented by the further rule that once the remedies have been exhausted and the highest court of the State has passed upon the problem, then Federal courts are reluctant to intervene because of comity and out of respect for State courts. Thus there has been created an endless circle, which if followed would deny to a Federal District court the right to give relief for basic constitutional rights.
>
> The Supreme Court states in Ex parte Hawk, supra, 'a federal court *will not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated'. (Emphasis supplied.)
>
> The general rule rests upon the balance between the State and Federal powers and jurisdictions, and the niceties of the comities existing between these separate sovereignties. The observance of these niceties and the concern concerning comity must give way on the assertion and finding of the violation of basic constitutional rights.

> Such a violation constitutes an exceptional case. It is therefore important that the exception be recognized and that where basic constitutional rights and liberties have been violated, that Federal Court should not refuse to grant relief." *Application of Middlebrooks* (1950), 88 F. Supp. 943, 955.

It is true that the argument can be advanced that granting of a hearing in the Federal Court after a State Court hearing gives a petitioner "two shots in the hunt"—notwithstanding that argument this Court has held that doubt if existing in a habeas corpus proceeding should be resolved in favor of the petitioner. A further answer to that argument in the instant case is that the New York State Courts are universal in their holding that "cruel and unusual punishments do not constitute a basis for relief" and therefore the "first shot in the hunt" herein could be typified by what the marksman calls "a dry run".

CONCLUSION

For the additional reasons stated in this reply brief, petitioner respectfully renews his request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit herein.

Respectfully submitted,

CURTIS F. MCCLANE,
Counsel for Petitioner.